

Appeal from a decision by the Miles City, Montana, District Office, Bureau of Land Management, requiring submission of a bond and payment of rental as a prerequisite to approval of assignment of right-of-way M-64026.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976--Rights-of-Way: Nature of Interest Granted

A decision of BLM to issue a right-of-way for a waste water injection well on public land where the mineral estate is held by private parties will be affirmed in accordance with the general rule in American law that once minerals have been removed from the ground the void formerly occupied by the minerals reverts to the surface owner in the absence of any controlling precedent to the contrary.

2. Appraisals--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals

An appraisal of the fair market value of a right-of-way will not be set aside on appeal if appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that charges are excessive. In the absence of a showing that the appraisal methods used by BLM are incorrect, an appraisal may be rebutted only by another appraisal.

3. Appraisals--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals

An application for a reduction in the fair market rental value charged for a right-of-way issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. || 1761-1771 (1982), on the ground of hardship, pursuant to the regulation at 43 CFR 2803.1-2(b)(2)(iv), 52 FR 25819 (July 8, 1987), may be

adjudicated for an existing right-of-way where the holder has tendered the estimated advance rental deposit demanded by BLM.

4. Federal Land Policy and Management Act of 1976: Rights-of-Way-- Rights-of-Way: Federal Land Policy and Management Act of 1976

BLM's decision to require the posting of a bond by the holder of a right-of-way will be upheld when appellant fails to demonstrate that BLM's decision is in error.

APPEARANCES: Tommy Roberts, Esq., Farmington, New Mexico, for appellant; Roger W. Thomas, Esq., Office of the Field Solicitor, Billings, Montana, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE GRANT

Mallon Oil Company (Mallon) has appealed from the October 21, 1987, decision of the Miles City, Montana, District Office, Bureau of Land Management (BLM), threatening cancellation of right-of-way M-64026 in the absence of submission of a \$10,000 bond and payment of rental in the amount of \$40,842.70 within 30 days. <sup>1/</sup> The rental payment and bond had previously been requested by letter of September 1, 1987, as a prerequisite to the approval of an assignment of right-of-way M-64026 from Damson Oil Company (Damson) to appellant.

On October 4, 1985, after receiving an underground injection control program permit from the Environmental Protection Agency (EPA) to dispose of waste salt water produced from its oil and gas operations, Damson applied to BLM for a right-of-way. By decision dated November 20, 1985, BLM granted Damson a right-of-way for a waste water disposal pipeline, plant site, and powerline pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. | 1761 (1982). Specifically, right-of-way M-64026 authorized the use of certain public land in SE<sup>^</sup> SE<sup>^</sup>, sec. 33, T. 9 N., R. 24 E. and lot 1, sec. 3, T. 8 N., R. 24 E., Principal Meridian, Montana, for the purpose of operating and maintaining an existing road, and constructing and maintaining an overhead powerline and an underground water pipeline. The right-of-way also included use of an existing well site and

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<sup>1/</sup> BLM's decision required Mallon to correct two deficiencies (payment of rental and submission of a bond) within a time certain, failing in which BLM would cancel the right-of-way. Such a decision is interlocutory, and the appeal period does not commence until the expiration of the time for compliance. A notice of appeal filed within the compliance period is actually an objection to action proposed to be taken and is, thus, properly deemed a protest. Randall J. Gerlach, 90 IBLA 338 (1986). BLM should have adjudicated Mallon's objections to its decision in the first instance. Nevertheless, it would serve no useful purpose to remand the case to BLM at this point to do so. Therefore, we will consider Mallon's objections as an appeal. See Beard Oil Co., 97 IBLA 66, 68 (1987).

pad for water disposal, construction of a building for a water disposal plant, and construction of a flood pit. The right-of-way for the road, powerline, and waterline measured 1,127 by 60 feet, and the total area for the well pad, building, and flood pit consisted of 1 acre.

Pursuant to section B.9. of the right-of-way grant, the right-of-way was issued subject to the agreement of the holder to pay the fair market rental value as determined by a BLM appraisal. Damson began using the right-of-way while the appraisal was being prepared. By letter dated February 24, 1986, BLM informed Damson that it had completed an appraisal, and had determined that the fair market rental value for the right-of-way was \$8 per annum for the facility site and 5 cents per barrel of disposed water. <sup>2/</sup> Based on Damson's estimate that 3,000 barrels would be disposed of per day, BLM requested payment of \$54,758 in advance rental for the first year.

Damson responded by asserting that the facility site rental was fair, but that the appraisal for the disposed water was erroneous. Damson alleged that it operated 11 oil wells in the Mason Lake Field and disposed of produced water from the wells in the injection well included in the right-of-way. Damson argued that it would not be economically feasible for it to continue to operate the wells in the field if it were required to pay this amount. BLM replied that the appraisal was correct. On September 2, 1986, BLM issued a decision, requiring that the \$54,758 rental be paid within 30 days or the right-of-way would be cancelled. Damson appealed this decision, specifically arguing that the rental of 5 cents per barrel was excessive. <sup>3/</sup>

On January 21, 1987, while the appeal was pending, Damson informed BLM that it had sold the disposal well to Mallon. On March 26, 1987, BLM received Mallon's application for assignment of the right-of-way in which Mallon agreed to be bound by all the terms, conditions, and stipulations of the existing grant. Subsequently, BLM informed both Mallon and Damson that this assignment could not be processed until Damson's appeal was resolved or withdrawn. On August 24, 1987, Damson requested that its appeal be dismissed, and by order dated August 31, 1987, the Board dismissed the appeal.

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<sup>2/</sup> Right-of-way M-64026 also included, in addition to the facility site, an area 1127 feet x 60 feet "to operate and maintain an existing road, construct and maintain an overhead powerline and a 4-inch underground water pipeline." BLM's appraisal did not cover this linear right-of-way, apparently because the methodology for determining rentals for such rights-of-way was not finalized until July 8, 1987. See 52 FR 25818. BLM should determine the back rental for this part of M-64026 in accordance with 43 CFR 2803.1-2 and assess the holder accordingly.

<sup>3/</sup> The record indicates that advance rental in the amount of \$43,458.95 was paid to BLM on Oct. 9, 1986, for the period ending Oct. 30, 1986. The reduced amount reflected a reduction in the rate of water production from the oil wells and the resulting rate of injection of waste water in the well served by the right-of-way from the rate of disposal projected earlier.

On September 11, 1987, BLM notified Mallon that Damson's appeal had been dismissed, and that BLM would proceed with the assignment upon receipt of the \$10,000 bond requested by BLM in a June 18, 1987, letter to Mallon, and \$40,842.70 rental for the period from November 1, 1986, the date Mallon began using the right-of-way, through December 31, 1988. Mallon did not respond to this letter, and on October 21, 1987, BLM issued a decision requiring the bond and rental payment within 30 days or the right-of-way would be cancelled and Mallon found in trespass. Mallon appealed this decision.

Appellant requested a stay of the decision appealed from pursuant to the regulation at 43 CFR 2804.1(b) pending review on appeal alleging the rental demanded would make oil and gas operations on the wells serviced by the waste water well uneconomical thus forcing premature abandonment of the wells. A stay was granted by Order of December 15, 1987. Subsequently, BLM has requested expedited consideration of this appeal indicating the rent due and unpaid for metered disposal through March 28, 1988, was \$20,130.85 plus interest. BLM further indicated Mallon had sold its interests and left the field. The motion for expedited review was granted by Order of July 12, 1988.

In its statement of reasons (SOR) in support of its appeal, Mallon challenges the 5 cents per barrel fee for the disposal of the waste water and the bonding requirement. Specifically, Mallon argues that BLM cannot charge rental for the use of the subsurface void into which the waste water is being disposed because the United States, as the surface owner, does not own the subsurface void. Mallon contends that neither BLM nor the Board has the authority to decide whether the United States, as owner of the surface but not the mineral estate, also owns the space created by the extraction of minerals. Mallon argues only a court, with subject matter jurisdiction, applying Montana law, can decide that issue. Appellant asserts that because no such court ruling has been made, no rental can be charged for the injection of waste water into the subsurface cavity.

Furthermore, even if BLM could charge rental for the disposal of the waste water, Mallon argues that BLM's appraisal of the fair market rental value of the right to inject water is excessive and unreasonable. Mallon contends that the appraisal was too limited in its scope because it analyzed only the fair market value of the right-of-way and failed to discuss other policy considerations found in FLPMA, such as the protection of the environment and the need for domestic sources of minerals from public lands. Mallon further argues that the comparable rentals used as the basis for the appraisal's market data analysis were not, in fact, comparable because those rentals involved situations in which commercial disposal companies, and not oil and gas companies, were charged by landowners for the right to dispose of waste water. Additionally, Mallon asserts that the assessed rental payment would have a significant adverse economic impact on Mallon's operations and would ultimately result in the waste of substantial domestic reserves of oil and gas and the loss of tax revenue and royalties to the Government.

Finally, Mallon argues that BLM should not require the posting of a bond because the existence of its EPA bond and individual producing well bonds adequately protect BLM's interests. Mallon contends that it is a solvent business with a reputation as a prudent oil and gas operator, further negating the need for the bonding requirement.

In its answer, BLM contends that its October 21, 1987, decision is valid and enforceable. BLM argues that the case law unequivocally supports its position that the United States, as the surface owner, also owns the subsurface void created by the extraction of minerals. Therefore, BLM asserts, charging rental for the use of these voids clearly is appropriate. BLM also notes that Mallon knew that rental had been assessed for the disposal of the waste water at the time it filed its application for assignment of the right-of-way.

BLM agrees that the appraisal focused solely on fair market rental value and did not consider other factors. BLM asserts that the appraisal technique it utilized is a standard appraisal process which estimates the value in the market place to typical grantors and grantees. BLM contends that the appraisal of fair market rental value required by 43 CFR 2803.1-2(a) is independent of consideration of the reduction or waiver of rental under 43 CFR 2803.1-2(b)(2)(iv). According to BLM, Mallon's argument that other policy factors should have been considered in the appraisal of fair market rental actually relates to the question of waiver or reduction of rental. BLM notes that 43 CFR 2803.1-2(b)(2)(iv) was not in effect at the time of the grant and, thus, argues it does not apply to this case. In response to Mallon's contention that the comparable rentals used in the appraisal were not, in fact, comparable, BLM points out that two of the rentals compared were leases to oil and gas producers, and that there was no significant difference between the rates charged to commercial disposal companies and to oil and gas producers. In short, BLM argues that its fair market rental value appraisal is entirely accurate and proper.

Finally, BLM argues that its decision to require a bond here fully complies with its statutory and regulatory authority. BLM notes that the EPA bond posted by Mallon cannot be used to comply with BLM's bonding requirement because the agencies had agreed in a July 1984 Memorandum of Understanding that separate bonding for plugging and abandoning disposal wells would be continued. BLM contends that Mallon's assertions that payment of the required rental would have a significant adverse economic impact on its field operations further demonstrates the need for a bond. In fact, BLM suggests that because of this assertion, the bond should be higher, or Mallon should be required to show proof of financial responsibility to plug and abandon the well.

[1] As a threshold matter, we reject Mallon's contention that only a court can decide whether the United States, as the surface owner, also owns the subsurface void, and, thus, that neither BLM nor this Board has the authority to decide this ownership question. While a court ultimately may be called upon to decide this question, BLM and this Board (on appeal) have

both the authority and the duty to determine questions concerning the extent of the ownership rights related to lands in which the United States has an interest. See City of San Antonio, Texas, 65 IBLA 326, 330-31 (1982); State of Montana, 11 IBLA 3, 13, 80 I.D. 312, 316-17 (1973). Indeed it would be irresponsible to grant a right-of-way for a waste water disposal well, such as the well at issue here, without a finding that the Department had the authority to allow such a use of the land. Therefore, we will address the question of ownership of the subsurface void.

Although the abstract of title to the lands in question is not part of the record, Mallon's statement of reasons contains a brief synopsis of the history of ownership of these lands. The lands originally were public domain. In 1895, the United States patented the lands to the Northern Pacific Railroad. In 1937, the United States reacquired the lands pursuant to a warranty deed from a private party. Prior to this deed, the mineral estate had been severed from the surface estate by an earlier reservation to a private party.

In appraising the fair market rental value for the disposal of the water, BLM assumed that the United States, as the surface owner, owned the subsurface void areas into which the water would be injected. Although Mallon contends that the United States does not own the subsurface void areas, it has offered no support for this contention. The general rule in the United States appears to be that, once the minerals have been removed from the soil, the space occupied by the minerals reverts to the surface owner by operation of law. See, e.g., Emeny v. United States, 412 F.2d 1319, 1323 (Ct. Cl. 1969); United States v. 43.42 Acres of Land, 520 F. Supp. 1042, 1045-1046 (W.D. La. 1981); Ellis v. Arkansas Louisiana Gas Co., 450 F. Supp. 412, 421 (E.D. Okla. 1978); 54 Am. Jur. 2d Mines and Minerals | 214 (1971); 58 C.J.S. Mines and Minerals | 162 (1948). This rule stems from the general interpretation of a mineral grant as giving the grantee the right to explore for, produce, and reduce to possession if found, the minerals granted, but not the stratum of rock containing the minerals. See, e.g., Ellis v. Arkansas Louisiana Gas Co., *supra* at 421; see also United States v. 43.42 Acres of Land, *supra* at 1046. There is no evidence that Montana law, which applies to the land at issue here, would differ from the general American rule, although no decisions applying Montana law to this issue have come to our attention. We, therefore, must affirm the BLM finding that the United States, as the surface owner, also owns the subsurface void into which Mallon disposes its waste water. Thus BLM may properly charge fair market rental value for the use of this void.

[2] Under section 504(g) of FLPMA, 43 U.S.C. | 1764(g) (1982), the holder of a right-of-way is required to pay rental annually in advance for the fair market value of the right-of-way when this value is established by an appraisal. Harvey Singleton, 101 IBLA 248 (1988); Glover Communications, Inc., 89 IBLA 276 (1985); see also Southern California Gas Co., 81 IBLA 358 (1984); Mountain States Telephone & Telegraph Co., 79 IBLA 5 (1984). The Board will not set aside a right-of-way rental appraisal unless appellant demonstrates error in the appraisal method used by BLM or shows by convincing evidence that the charges are excessive. Jim Doering, 91 IBLA 131 (1986); Glover Communications, Inc., *supra*; Southern California Gas Co.,

supra. In the absence of compelling evidence that a BLM appraisal is erroneous, such an appraisal generally may be rebutted only by another appraisal. Dwight L. Zundel, 55 IBLA 218 (1981).

Although Mallon describes its entire argument as questioning BLM's appraisal of the fair market value for its right-of-way, only Mallon's contention that "the comparable rentals cited in the appraisal report appear to involve situations in which commercial disposal companies were charged by landowners for the right to dispose of produced water" (SOR at 16) actually challenges BLM's appraisal determination. <sup>4/</sup> The comparable lease method used by BLM in this case to determine the fair market value is the preferred method for appraisal when there is sufficient comparable rental data. See Horizon Communications, 91 IBLA 399 (1986). As BLM correctly points out in its answering brief, Mallon has misread the appraisal report. At least two of the six leases compared involve leases from landowners to oil well producers, rather than disposal companies. Furthermore, the appraisal report reveals no significant difference between the rates charged to oil well producers and those charged to commercial disposal companies. "The rental charge should not be what appellant would like to pay or what BLM would like to charge, but rather that rental which would be a fair amount on the open market for appellant to pay and BLM to receive." Northwestern Colorado Broadcasting Co., 49 IBLA 23, 27 (1980). Mallon has shown no error in the appraisal method used by BLM, nor has it provided another appraisal or any other evidence that the charges are excessive.

[3] In addition to its attack on the appraisal of the fair market rental value of the right-of-way, appellant seeks to qualify for the newly promulgated hardship exception. By rulemaking published in the Federal Register in 1987 the Department introduced a new provision at 43 CFR 2803.1-2(b)(2)(iv) authorizing a charge of less than fair market rental value in certain circumstances:

(2) The authorized officer may reduce or waive the rental payment under the following instances:

<sup>4/</sup> Mallon appears to argue that BLM's entire appraisal process is deficient because it focuses only on the fair market rental value of the right-of-way as required by section 504(g) of FLPMA, 43 U.S.C. | 1764(g) (1982), and neglects to consider any of the other policy considerations enunciated in section 102(a) of FLPMA, 43 U.S.C. | 1701(a) (1982). The simple answer to this argument rests on the basic principle of statutory construction that "the general section setting forth legislative goals neither constitutes an operative section of the statute nor prevails over the specific provisions." Bissette v. Colonial Mortgage Corp. of D.C., 477 F.2d 1245, 1246 n.2 (D.C. Cir. 1973). FLPMA itself establishes this principle at section 102(b), 43 U.S.C. | 1701(b) (1982). BLM's appraisal process clearly comports with FLPMA's mandates.

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(iv) With the concurrence of the State Director, the authorized officer, after consultation with an applicant/holder, determines that the requirement to pay the full rental will cause undue hardship on the holder/applicant and that it is in the public interest to reduce or waive said rental. In order to complete such consultation, the State Director may require the applicant/holder to submit data, information and other written material in support of a proposed finding that the right-of-way grant or temporary use permit qualifies for a reduction or waiver of rental \* \* \* .

52 FR 25819 (July 8, 1987). It was explained in the preamble to the rulemaking that this provision was "added by the proposed rulemaking to cover unique hardship cases." 52 FR 25816 (July 8, 1987). With respect to the question of the application of the new provisions to existing rights-of-way, the preamble explained that the provisions of the rulemaking should be applicable to: "(2) Existing right-of-way cases where an estimated rental deposit was collected and the right-of-way provided for a subsequent rental determination (basically those issued since November 1984)." 52 FR at 25818. Thus, it appears that this provision, despite BLM's claim to the contrary, may be applied to pre-existing rights-of-way. We note, however, that an advance rental deposit is an apparent prerequisite to adjudication of such a request. There is no indication in the record that appellant has tendered any deposit toward the rental due. Further, we note that although appellant has submitted with the statement of reasons for appeal an economic analysis of the costs of operating the Mason Lake Field (Appellant's Exh. E) in support of its claim to a hardship exception, it does not appear this information has been previously submitted to BLM. Thus, BLM has not had appellant's application for a hardship exception before it for adjudication.

Accordingly, we find it appropriate to affirm the appraisal of the fair market rental value for the right-of-way and affirm the order to appellant to tender the rental due based thereon. This decision is without prejudice to appellant's request for hardship reduction in the rental due which should be presented to BLM upon return of the case file for adjudication under 43 CFR 2803.1-2(b)(2)(iv).

[4] Section 504(i) of FLPMA, 43 U.S.C. | 1764(i) (1982), authorizes the imposition of a bond requirement on a holder of a right-of-way whenever the Secretary deems it appropriate. BLM may require the holder of a right-of-way to furnish a bond to secure the obligations imposed by the grant and applicable laws and regulations. 43 CFR 2803.1-3. In this case, BLM determined that a \$10,000 bond was necessary to ensure satisfaction of the right-of-way grant stipulations. Mallon contends that BLM should exercise its discretion and not require the posting of the bond. Mallon notes that it has secured a \$10,000 bond pursuant to the requirements of the EPA to cover its operations with respect to the disposal well and that it has individual bonds for each of its producing or injection wells in its oil



and gas operations. Mallon argues that it is a prudent operator and producer, and that those bonds adequately protect BLM's interests with respect to the right-of-way.

BLM notes that a July 1984 Memorandum of Understanding between BLM and EPA, for the purpose of implementing the underground injection control program for class II wells under BLM jurisdiction in the State of Montana specifically provides that both EPA and BLM shall require separate bonds for the plugging and abandoning of disposal wells. This precludes the use of the EPA bond to satisfy BLM requirements. Additionally, there has been no showing the bond for Mallon's producing wells would secure the performance obligation under the right-of-way.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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Bruce R. Harris  
Administrative Judge